Supreme Court, U.S.
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No. 07-531

In The
Supreme Court of the United States

JEFF GEORGE,

Petitioner,

v.

AERO LODGE 735,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 17, 2007

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QUESTIONS PRESENTED FOR REVIEW

Did not the United States Courts of Appeals for the Sixth Circuit err in holding that a labor union of which the plaintiff is a member could under no circumstances as a matter of law be an "employer" for purposes of the Family and Medical Leave Act of 1993 ?

RULE 14.1[b] SATEMENT

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Jeff George.

Defendant-Appellee and Respondent: Aero Lodge 735

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE COURTS

The Opinion of the United States Court of Appeals for the Sixth Circuit dated July 26, 2007 (a *per curiam* Opinion by Circuit Judges Keith and Griffin and District Judge Van Tatenhove, sitting by designation) was not recommended for full-text publication and is not reported.

The Order granting the defendant/respondent's motion to dismiss for failure to state a claim upon which relief can be granted dated October 18, 2006 is likewise unreported.

CONCISE STATEMENT OF THE BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

This is a direct appeal from a result obtained in a United States Court of Appeals. Consequently, the United States Supreme Court has jurisdiction by virtue of 28 USC ¶ 1254.

STATUTES AND REGULATIONS INVOLVED IN THE CASE, *verbatim*

29 USC ¶ 2611[4][A][ii][I]

[4] Employer.

[A] In general. The term "employer"—

[i] means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

[ii] includes –

[I] any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

29 CFR ¶ 825.104[a]
[redacted]

[a] An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer...

29 CFR ¶ 825.220[a][3]
[redacted]

All persons (whether or not employers) are prohibited from discharging any person (whether or not an employee) because that person has...

CONCISE STATEMENT OF THE CASE

This is a true case of first impression in which the facts of this case are entirely undisputed.

The United States District Court for the Middle District of Tennessee had jurisdiction over the instant controversy by virtue of the federal Family and Medical Leave Act of 1993, which is codified at 29 USC §§ 2601 *et seq*. The Sixth Circuit had jurisdiction over this controversy by virtue of Mr. George's appeal being a direct appeal as of right within the meaning of Rules 3 and 4 of the Federal Rules of Appellate Procedure.

United States District Judge Nixon dismissed Mr. George's Complaint for failure to state a claim upon which relief can be granted. The facts as alleged must be taken as true as a matter of law.[1]

Jeff George was an hourly worker at Vought Aircraft Industries, Inc. and was a member of the defendant union. In 1985, Mr. George suffered a back injury which, over time, became chronic in nature. He alleges that the defendant labor union willfully and intentionally failed to make those accommodations for him as required by the FMLA in that it did not adequately investigate and act upon his medical and workplace difficulties. As a result, Mr. George insists that he was deprived of front pay and benefits of employment, and he suffered other economic damage.

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[1] *Klimas c. Comcast Cable Communications, Inc.*, 465 F.3d 271 at 276 (6th Cir. 2006). Further citations omitted.

REASONS FOR GRANTING THE PETITION AND ARGUMENT

It is pertinent to note, again, that the issue of whether or not a labor union can, as a matter of law, be the "employer" of a union member who is paid by some entity other than the union for FMLA purposes is a question of first impression. Neither the United States Supreme Court nor any federal circuit court of appeals has spoken to the matter, even indirectly. Rule 10[c] of the Rules of The United States Supreme Court expressly refers to "...an important question of federal law that has not been, but should be, settled by this Court...". That is PRECISELY the situation here.

Since the allegations in Mr. George's complaint must be taken as true, we must first seek statutory guidance in resolving the matter.

Both the United States Code and the Code of Federal Regulations define "employer" for FMLA purposes as "...any person acting, directly or indirectly, in the interest of a covered employer...". There was no dispute in the courts below that the union is a "person" as defined. So, ultimately, the inquiry devolves to this: is a labor union that intentionally and willfully fails to investigate a member's FMLA claims acting "directly or indirectly in the interest" of the worker's direct employer?

Since there is no guidance in the case law, we must rely on the plain meaning rule of statutory

construction.[2] Mr. Justice Holmes' justly famous aphorism – "I don't care what the intention was. I only want to know what the words mean"[3]- must serve as our lodestar. The only purpose of a labor union is to represent the interests of its members as those interests may appear. Invariably, that duty creates an adversarial relationship between the union and those entities that employ its workers. Where, as here, a union intentionally fails in its duty, that union must necessarily be acting as that which is tantamount to an alter ego of the direct employer. Words have meaning. In the narrow context of the undisputed facts before this the District Court and the Sixth Circuit, the meaning of the words is clear.

Of equal clarity is the language of the commentary included in 29 CFR ¶ 825.105: "Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act" Here, there can be no question of Vought's knowledge of the Respondent's wrongdoing. This requirement is entirely consistent with 29 CFR ¶ 825.220[a][1], which makes it crystal clear that any entity deemed an "employer" is in FMLA violation if it interferes with an exercise or attempt to exercise an FMLA-given right; here, the Respondent labor union

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[2] *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 at 241 (1989).

[3] As quoted by Mr. Justice Frankfurter in *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev., no. 4, pps. 527-546 (May 1947).

withdrew the Petitioner's grievance, as plain an interference as could be envisioned.[4]

The analysis used by the both Judge Nixon and by the Sixth Circuit created a distinction without a difference. In concluding that the union could not be Mr. George's employer for FMLA purposes, both courts below tacitly ignored the plain meaning of 29 CFR 825.220[a][3]:

> "all persons (whether or not employers) are prohibited from discharging any person (whether or not an employee) because that person has..." .

CONCLUSION

This case presents an issue of substantial importance that has never been decided. Under the narrow circumstances presented by this particular case, the defendant/respondent labor union was acting as Jeff George's employer for FMLA purposes. The plain meaning of the words both in Title 29 itself and in the Code of Federal Regulations[5] will admit of no other result.

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[4] It is important in context to recall that the FMLA supersedes any purportedly contrary provision[s] of the Collective Bargaining Agreement. 29 CFR ¶ 825.700[a].

[5] CFR regulations always have the force of law. *Johnson v. City of Detroit*, 446 F.3d 614 at 630 (6th Cir. 2006).

Respectfully submitted,

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